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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1998

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STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, *Respondent*.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


| | Page |
|---|---|
| ARGUMENT | 1 |
| I. THE COURT BELOW DID NOT HAVE JURISDICTION TO ENTERTAIN SANTA FE'S SUMMARY JUDGMENT MOTIONS | 1 |
| II. A REMEDY UNDER THE DOCTRINE OF *EX PARTE YOUNG* IS NOT AVAILABLE TO SANTA FE AGAINST THE INDIVIDUAL BOARD MEMBERS BECAUSE IT DOES NOT SEEK PROSPECTIVE RELIEF | 8 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **Cases** | |
| *Agostini, et al. v. Felton*<br>521 U.S 203 (1997) | 6 |
| *Coeur d'Alene Tribe of Idaho v. Idaho*<br>521 U.S. 261 (1997) | 9 |
| *Commissioner v. Sunnen*<br>333 U.S. 591, 598 (1948) | 6 |
| *Ex Parte Young*<br>209 U.S. 123 (1909) | 8, 9 |
| *Frommhagen v. Board of Supervisors*<br>197 Cal.App.3d 1291, 1300 (1987) | 6 |
| *Harper v. Virginia Department of Taxation*<br>509 U.S. 86, 96-97 (1993) | 7 |
| *Matek v. Murat*<br>862 F.2d 720, 724 n. 1 (9th Cir.1988) | 6 |
| *Montana v. U.S.*<br>440 U.S. 147, 158 (1979) | 6 |
| *Oregon Short Line Railroad Co. v. Department of Revenue, Oregon*<br>139 F.2d 1259 (9th Cir. 1998) | 6, 7 |
| *Russell v. United States*<br>592 F.2d 1069, 1071 (9th Cir. 1979) | 6 |

## TABLE OF AUTHORITIES, CONT'D

*Seminole Tribe of Florida v. Florida*
517 U.S. 44 (1996) 1, 2, 5, 6, 7

*State Bd. of Equal., Calif. v.*
*So. Pacific Transp. Co., et al.*
No. 98-584 8

**Statutes**

49 U.S.C.
§ 11501 1, 2, 9

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## ARGUMENT

### I.

### THE COURT BELOW DID NOT HAVE JURISDICTION TO ENTERTAIN SANTA FE'S SUMMARY JUDGMENT MOTIONS

In its order issued October 28, 1997, the U.S. District Court for the Northern District of California determined that, in light of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), it was divested of subject matter jurisdiction to hear claims of discrimination pursuant to section 306 of the Railroad Revitalization and Regulatory Reform Act (hereinafter the "4-R Act"), 49 U.S.C. section 11501. Despite the district court's determination, that court then granted the summary judgment motions of plaintiff Atchison, Topeka & Santa Fe Railway Co., the corporate predecessor of the Burlington Northern & Santa Fe Railway Co. (hereinafter "Santa Fe") for the 1991 and 1993 tax years on the basis that a final order and judgment already had been entered

with respect to assessments for 1989 through 1992, and because the stipulated injunction with respect to the 1993 tax year became final when the Ninth Circuit Court of Appeals dismissed the appeal of the State Board of Equalization (hereinafter the "Board") in Case No. 95-15999. Appendix To Petition For Writ Of *Certiorari* (hereinafter "Pet. App.") B, pp. 28-29. In its opposition to the petition for *certiorari*, Santa Fe argues that, in this context, the retroactive application of the *Seminole Tribe* decision would be inappropriate. However, as discussed below, the record in this case establishes that no final order or judgment as to the 1991 escape assessment for the value of Commuter Property or the assessment for the 1993 tax year was entered prior to this Court's decision in *Seminole Tribe*. These are the only assessments now at issue before this Court.

In 1993, the district court presided over a trial regarding allegations that the Board had violated section 306(1)(d) of the 4-R Act. Following the trial, but prior to entry of judgment, the court added the 1993 tax year to this case by a stipulated order of preliminary injunction. The preliminary injunction states in pertinent part that the provisions of the injunction were to remain in place "pending the determination of this action, or further order of this Court". See Appendix to Respondent's Brief in Opposition (hereinafter "Resp. App.") p. 2a.

The district court subsequently issued its findings regarding the 1989 through 1992 tax years that the Board and the defendant counties discriminated against Santa Fe in violation of section 306(1)(d). The district court's Order and Findings of Fact and Conclusions of Law were filed June 7, 1994, and September 7, 1994, respectively. These findings defined the Commuter Property at issue as follows:

> "[P]roperties which the SBE assigned both class codes 1 and 891 to *in tax year 1992*, based on Santa Fe's negotiations with various southern

> California transit districts to sell track and/or trackage rights for commuter purposes (hereinafter referred to as 'the *Commuter Property*'). Resp. App. p. 30a; emphasis added.

In addition, the findings state that, although Santa Fe has similar claims relating to the 1993 tax year, "the Court will resolve those issues at a later date" using the same legal principles as set forth therein. Resp. App. p. 38a.

On September 12, 1994, the proposed Partial Judgment submitted by Santa Fe to the Court was signed and filed. Resp. App. p. 39a. The defendants were thereby "permanently enjoined from collecting or seeking to collect any taxes on the Subject Property *as defined in the Court's Findings of Fact and Conclusions of Law for tax years 1989 through 1992*". Resp. App. p. 40a; emphasis added. Consistent with the district court's findings, the judgment further provided that it does not resolve any of Santa Fe's claims relating to the 1993 tax year. Resp. App. p. 40a. (The amount set forth in the judgment was incorrect, and, after the correct amount of refund was determined, the Modified Partial Judgment was filed on April 24, 1995.)

On May 23, 1995, the Board filed its notice of appeal to the Ninth Circuit Court of Appeals, Case No. 95-15999, which was addressed only to the second category of property, the Commuter Property. According to the district court's findings and judgment, the Commuter Property was at issue only for the 1992 tax year. Resp. App. pp. 30a, 40a.

On June 29, 1995, the Board adopted a non-unitary escape assessment for Commuter Property for 1991 and sent a notice to that effect to Santa Fe. Consistent with the district court's judgment, the notice provided that no county would collect or seek to collect any tax based on the escape assessment pending the outcome of the Board's appeal in Case No. 95-15999. Pet. App. E, p. 3.

On October 5, 1995, Santa Fe filed a *new* complaint in the district court, Case No. C 95-3532 DLJ, alleging *inter alia* that the escape assessment for 1991 results in discriminatory treatment and constitutes an improper classification. Santa Fe also filed a motion for an order directing the Board to show cause why it should not be held in contempt for issuing an escape assessment that Santa Fe contended was in violation of the Court's orders. In particular, Santa Fe claimed that the Board violated the above-referenced judgments because the Board was "permanently enjoined" from "collecting or seeking to collect any taxes on the Subject Property as defined in the Court's Findings and Conclusions of Law for tax years 1989 through 1992". However, in denying the contempt motion, the district court held that the assessment was not in direct violation of the judgment. Pet. App. E. In reaching its decision, the district court stated:

> "According to the Court's definition of the "Subject Property" in its Findings of Fact and Conclusions of Law, the only Commuter Property to which the judgment applied was . . . in tax year 1992, . . .. However, the Court's injunction applied to the taxes on such property for tax years 1989 through 1992. Since it is unclear whether the Court's order applies to assessments on Santa Fe's class 891 Commuter Property for tax years 1989 through 1992 or just for tax year 1992, the Court shall not base its decision on this argument. Nonetheless, the Court finds insufficient grounds for contempt based on defendants' other arguments" Pet. App. E, pp. 8-9.

On March 27, 1996, after all briefs were submitted in the Board's appeal to the Ninth Circuit Court of Appeals, this Court issued its decision in *Seminole Tribe*. The decision was brought to the attention of the Ninth Circuit, and that court directed the parties to be prepared to

discuss the implications of the decision at oral argument. However, the Ninth Circuit's opinion did not address the issue raised by *Seminole Tribe*, nor did it reach the merits of the case. Instead, in a decision issued January 6, 1997, the Ninth Circuit held that the Board's appeal was untimely.

In its opposition to the current petition, Santa Fe argues that the district court's "prior judgments regarding the 1991 and 1993 tax years became final when entered on September 12, 1994". Respondent's Brief in Opposition p. 8. However, as the above facts from the record demonstrate, no such prior judgments exist concerning the tax assessments here at issue. The validity of those assessments was not finally determined by the district court before a July 18, 1997, hearing on the Board's motion to dismiss.

Santa Fe filed its complaint regarding the 1991 escape assessment for Commuter Property, in Case No. C 95-3532 DLJ, on October 5, 1995. The Partial Judgment and Modified Partial Judgment relating to the 1994 trial of the 1989 through 1992 tax years refers to definitions set forth in its Findings of Fact and Conclusions of Law that specifically state that the only Commuter Property covered by the Court's ruling was in the 1992 tax year. Thus, prior to the July 18, 1997, hearing on the Board's dismissal motion, there was no judgment on the merits regarding the escape assessment for Commuter Property in the 1991 tax year. If there had been such a judgment, the complaint and judgment in Case No. C 95-3532 (Pet. App. B, p. 31) would have been unnecessary.

In addition, the preliminary injunction regarding the 1993 tax year did not automatically become permanent when the Ninth Circuit dismissed the Board's appeal or at any time prior to the July 18 hearing. Rather, the 1994 Partial Judgment and 1995 Modified Partial Judgment specifically provide that they do "not resolve any of Santa

Fe's claim relating to the tax year 1993". Resp. App. p. 40a.[1/]

Thus no final judgment regarding Commuter Property for 1991 and the assessment for 1993 had been entered prior to this Court's decision in the *Seminole Tribe* case. In determining the Board's motion in 1997, the district court was free, and required, to consider its subject matter jurisdiction over Santa Fe's claims for those years.

The Ninth Circuit's summary affirmance which is the subject of the pending petition apparently was based solely upon the Ninth Circuit's substantive holding, in *Oregon Sort Line Railroad Co. v. Department of Revenue, Oregon*, 139 F.2d 1259 (9th Cir. 1998), that the *Seminole* decision does not apply to restrict federal court jurisdiction in 4-R

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1. The Board notes that *res judicata* could not be applied to the 1991 escape assessment or the 1993 assessment in order to resolve Santa Fe's claims regarding those assessments. The property tax at issue is levied on an annual basis and, consequently, each year is the origin of a new liability and of a separate cause of action. (*Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948); *Russell v. United States*, 592 F.2d 1069, 1071 (9th Cir. 1979); *Frommhagen v. Board of Supervisors*, 197 Cal.App.3d 1291, 1300 (1987). Thus, if a claim regarding a particular tax year is litigated, a judgment on the merits is *res judicata* only as to any subsequent proceeding involving the same claim *and the same tax year. Id.* That is not what has happened here. Moreover, collateral estoppel and the doctrine of law of the case also are not applicable here because this Court's decision in *Seminole Tribe* constituted a significant change in the controlling case law. See, *Agostini, et al. v. Felton*, 521 U.S 203 (1997); *Montana v. U.S.*, 440 U.S. 147, 158 (1979); *Commissioner v. Sunnen, supra*, 333 U.S. at 606; *Matek v. Murat* 862 F.2d 720, 724 n. 1 (9th Cir.1988) [One ground that justifies reconsideration of the law of the case is an intervening change of controlling law].

Act cases. Santa Fe's motion for summary affirmance was based solely upon that substantive holding in *Oregon Short Line*. However, *Oregon Short Line* also contains a preliminary ruling, consistent with this Court's holding in *Harper v. Virgina Department of Transportation*, 509 U.S. 86, 96-97 (1993), that the *Seminole* decision had full retroactive effect as to all cases which were not yet final. 139 F.3d at 1265. In this context the Ninth Circuit's summary affirmance as to the judgment in favor of the Santa Fe should be treated as a holding that, even if the district court were wrong as to the pre-*Seminole* finality of any determinations concerning the assessments here at issue, summary affirmance was appropriate under the substantive *Oregon Short Line* rule that *Seminole* does not apply to 4-R Act cases.

## II.

## A REMEDY UNDER THE DOCTRINE OF *EX PARTE YOUNG* IS NOT AVAILABLE TO SANTA FE AGAINST THE INDIVIDUAL BOARD MEMBERS BECAUSE PROSPECTIVE INJUNCTIVE RELIEF IS NOT AVAILABLE

In its opposition to the petition for *certiorari* Santa Fe argues that granting the relief requested would not end this litigation. Resp. Br. pp. 10-11. Santa Fe argues it would still be entitled to receive prospective injunctive relief against the individual Board members in their capacities as state officials under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1909).[2/] However, as the district court found below, there are no continuing acts of the Board to be enjoined with respect to 1991 and 1993. Pet. App. B, pp. 23-24. Under California law, the assessments at issue are final and became final prior to the district court's entry of preliminary injunctions for those years. Pet. App. B, pp. 23-24. Thus, the district court found that Santa Fe was in fact seeking retroactive relief against the Board and denied Santa Fe's motions to amend its complaints to include a cause of action against

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2. As this Court is aware, the Board has another petition pending before it regarding the same issue as presented here. *State Bd. of Equal., Calif. v. So. Pacific Transp. Co., et al.*, No. 98-584. In its opposition to that petition, the Southern Pacific Transportation Company makes the same argument. Brief in Opposition pp. 5-7. However, as discussed herein, the *Ex Parte Young* doctrine is inapplicable, and the relief sought by the Board's petitions for *certiorari* would end the railroads' litigation in federal court.

the individual Board members. In the absence of any continuing act of the Board to enjoin, the *Ex Parte Young* doctrine could not be used to continue this litigation in federal court.

Even if there were ongoing acts of the Board against which injunctive relief could be sought, the district court found that Santa Fe and the other plaintiff railroads should not be allowed to use the fiction of *Ex Parte Young*. Citing *Coeur d'Alene Tribe of Idaho v. Idaho*, 521 U.S. 261, 274-278 (1997), the district court made the following determination:

> "The Court finds that California's power to assess property in the manner it deems appropriate would be impacted severely if the Court were to allow plaintiffs to proceed with this case under the fiction of *Ex Parte Young*. In addition, the Court finds the power to tax at issue here is every bit as central to state sovereignty as Idaho's interest in the submerged lands in question in *Coeur d'Alene*. Consequently, the Court finds that the nature of the present case is such that a federal court should not involve itself in a challenge to state administrative action. *Cf. Coeur d'Alene*, 117 S.Ct at 2037-38. Accordingly, the Courts holds that plaintiffs may not maintain the present suit against the individual members of the Board under *Ex Parte Young*. Pet. App. p. 22; footnote omitted.

Thus, contrary to its arguments, Santa Fe would not be able to obtain complete relief in this case in federal court notwithstanding a decision by this Court that the Board has Eleventh Amendment immunity from suits filed pursuant to the 4-R Act. Granting the relief sought by the Board's petition for *certiorari* would indeed end this litigation in federal court.

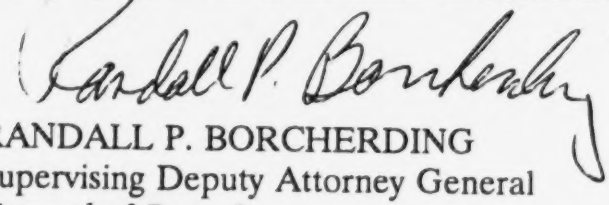
## CONCLUSION

For the reasons given above, the Board respectfully asks that the petition for *certiorari* be granted.

Dated: May 11, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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# APPENDIX E

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Delaware corporation,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

No. C-95-3532 DLJ

ORDER

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On February 21, 1996, the court heard argument on plaintiff's motion for an order to show cause why defendants should not be held in contempt. Paul J. Mooney of Fennemore Craig, P.C. appeared on behalf of plaintiff; Marguerite C. Stricklin of the California Attorney General's Office appeared for defendants. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES plaintiff's motion.

## I. BACKGROUND

### A. Factual Background and Procedural History

Plaintiff, The Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") originally filed a suit against the California State Board of Equalization ("SBE") and several California Counties, challenging the assessment and collection of ad valorem taxes against its property pursuant to Sections 306(1) (a) and (d) of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 ("the 4-R Act). The Court held a bench trial on only Santa Fe's claims under subsection 306(1) (d) of the 4-R Act for tax years 1989 through 1992. The Court concluded that defendants had discriminated against Santa Fe in violation of subsection 306(1) (d) by imposing a tax that results in discriminatory treatment of Santa Fe. In particular, the Court found that the SBE's categorization of "Non-unitary Railroad Property Eligible for 4-R Act Relief" ('NURPEFAR") was discriminatory, because such property is the only class of property in the State of California that is taxed on the basis that it may be sold or otherwise disposed of in the future. See September 7, 1994, Findings of Fact and Conclusions of Law at ¶ 14.

On September 12, 1994, the Court issued a Partial Judgment, and on April 24, 1995, it issued a Modified Partial Judgment, permanently enjoining defendants "from collecting or seeking to collect any taxes on the Subject Property as defined in the Court's Findings of Fact and Conclusions of Law for tax years 1989 through 1992." September 12, 1994, Partial Judgment at 2:14-17; April 24, 1995, Modified Partial Judgment at 2:22-24. The Findings of Fact and Conclusions of Law defined the subject property as two categories of NURPEFAR:

> (1) properties which the SBE reclassified for tax years 1989 through 1992 from unitary class codes 1 and 2 to "operating non-unitary" class codes 191 and 192 (changed for 1991 and 1992 to 891 and 892), based on statements by Santa Fe's

> management in 1986 and/or 1989 that such properties might be "sold or abandoned" sometime in future (hereinafter referred to as "the Restructuring Plan Property"); and (2) properties which the SBE assigned both class codes 1 and 891 to in tax year 1992, based on Santa Fe's negotiations with various southern California transit districts to sell track and/or trackage rights for commuter purpose[s] [hereinafter referred to as "Commuter Property"].

September 7, 1994, Findings of Fact and Conclusions of Law at ¶ 12.

In addition, the Court ordered defendants to pay Santa Fe a refund of $856,917 for the taxes paid on the Subject Property for the relevant tax years, or in the alternative to grant Santa Fe a credit against future tax payments in that amount. See April 24, 1995, Modified Partial Judgment at 2-3.

On June 29, 1995, the SBE sent Santa Fe a "Notice of Escape Assessment" concerning Santa Fe's class 891 property for tax year 1991. The notice informed Santa Fe that the SBE had adopted nonunitary escape assessments for 1991 on Santa Fe's 891 property in the amount of $234,000,000. The notice added that the escape assessment was made in conformity with the Court's April 24, 1995, Modified Partial Judgment and that the county would not collect or seek to collect any tax based on the escape assessment pending the outcome of the Board's appeal to the Ninth Circuit.

On October 4, 1995, Santa Fe filed the complaint in this action, alleging, inter alia, that the escape assessment for 1991 constituted discriminatory treatment and an improper classification. Thereafter, on October 30, 1995, Santa Fe

filed this motion for an order to show cause why defendants should not be held in contempt. Santa Fe argues that the SBE's escape assessment for 1991 is in direct violation of this Court's orders precluding defendants from collecting or seeking to collect any taxes on Santa Fe's 891 property for 1991.

B. Legal Standard

Federal courts possess the inherent authority to enforce compliance with their orders. Gompers v. Buck's Stove & Range Co., 31 S. Ct. 492, 501 (1911); Gifford v. Heckler, 741 F.2d 263, 265 (9th Cir. 1984); see 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2960, at 581-81 (1973 & Supp. 1991) [hereinafter "Wright & Miller"]. The power to hold a person in contempt is delineated by statute:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority; and none other, as--
> . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401; see also U.S. v. Barnett, 84 S.Ct. 984, 987-88 (1964) (noting that contempt power was first codified in Judiciary Act of 1789). The Court has wide latitude in determining whether a party has acted in contempt of its orders. Gifford v. Heckler, 741 F.2d 263, 266 (9th Cir. 1984) (citing Neebars, Inc. v. Long Bar Grinding, Inc., 438 F.2d 47, 48 (9th Cir. 1971)).

The civil contempt power exists to permit the Court to deal with two situations. First, it allows the Court to coerce an intransigent party to comply with Court orders. Second, the Court may use its civil contempt power to force a disobedient party to compensate innocent parties for the

damages caused by its noncompliance with the Court's orders. General Signal Corp. v. Donallco Co., Inc., 787 F.2d 1376, 1380 (9th Cir. 1986) (citing cases); Shuffler v. Heritage Bank, 720 F.2d 1141, 1147 (9th Cir. 1983); see 11 Wright & Miller, § 2960, at 584. Punitive sanctions are imposed on noncomplying parties only in exercise of the criminal contempt power. Gompers, 31 S.Ct. at 498; Portland Feminist Women's Health Center v. Advocates for Life, 877 F.2d 787, 788 (9th Cir. 1989).

There are three basic elements necessary for a prima facie showing of civil contempt. First, there must be a valid Court order that is clear in its commands. Balla v. Idaho State Board of Corrections, 869 F.2d 461, 465 (9th Cir. 1989) (court order must be "specific and definite"). Second, there must be actual notice to the parties of the terms of the order. Fed. R. Civ. P. 65(d). Third, the party must have violated the order. General Signal Corp. 787 F.2d at 1379; U.S. v. Rylander, 656 F.2d 1313, 1318 (9th Cir. 1981), rev'd on other grounds, 103 S.Ct. 1548 (1983). There is no requirement that a violation be willful. U.S. v. Laurins, 857 F.2d 529, 534 (9th Cir. 1988); Perry v. O'Donnell, 759 F.2d 1985) (comparing civil contempt to criminal contempt, where specific intent is required); Donovan v. Mazzola, 716 F.2d 1226, 1240 (9th Cir. 1983) ("Intent is not an issue in civil contempt proceedings. The sole question is whether a party complied with the district court's order.") (citations omitted).

There are two primary defenses to a charge of civil contempt. First, a party may demonstrate that it is unable to comply with the court order. Rylander, 656 F.2d at 1317, rev'd on other grounds, 103 S.Ct. 1548 (1983); Sekaquaptewa, 544 F.2d at 404. This is not a favored defense; inability to comply must be proven "categorically and in detail." Donovan, 716 F.2d at 1240 (quoting Rylander, 656 F.2d at 1313).

Second, a party may demonstrate that it is in substantial compliance. Balla, 869 F.2d at 466 ("Substantial compliance with a court order is a defense to an action for civil contempt."); National Advertising Co. v. City of Orange, 861 F.2d 246, 250 (9th Cir. 1988); General Signal Corp., 787 F.2d at 1379 (citing cases); Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 891 (9th Cir. 1982) (citing many cases). As part of a showing of substantial compliance, the defending party must prove that it has taken "all reasonable steps" necessary to comply with the order. Balla, 869 F.2d at 466; In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987); Gifford v. Heckler, 741 F.2d 263, 265 (9th Cir. 1984) (citing Shuffler, 720 F.2d at 1146-47, and Sekaquaptewa v. MacDonald, 544 F.2d 396, 404 (9th Cir. 1976)). These steps include reasonable inspections to ensure that a party's agents and associates are complying with the court order. See Sekaquaptewa, 544 F.2d at 404 (holding that failure to inspect constituted evidence of violation). "[T]echnical or inadvertent violations of the order will not support a finding of civil contempt." General Signal Corp., 787 F.2d at 1379. Demonstrating that a party did not take all reasonable steps is part of the prima facie case. See Gifford, 741 F.2d at 265 (equating violation of court order with failure to take all reasonable steps necessary to ensure compliance).

The party seeking a finding of civil contempt has the burden of proving a prima facie case. Rylander, 656 F.2d at 1318, rev'd on other grounds, 103 S.Ct. 1548 (1983). The prosecuting party must present clear and convincing evidence that the defending party had notice of the court order and that the order was violated. Id.; Vertex, 689 F.2d at 889 (noting that this is higher standard than usual preponderance of evidence standard used in most civil cases); 11 Wright & Miller, § 2960, at 591. Once a prima facie case has been established, the burden of proof shifts to the defending party to establish any defenses it might raise.

See, e.g., Donovan, 716 F.2d at 1240 (considering inability to comply defense). The burden primarily consists of a burden to produce evidence supporting the defense. Once "detailed evidence" has produced, the burden of persuasion on these defenses shifts back to the prosecuting party. Rylander, 656 F.2d at 1318 (citing and analogizing to Title VII cases).

## II. ARGUMENTS

Santa Fe argues that defendants should be held in contempt on three grounds: (1) because the escape assessment is in direct violation of this Court's order; (2) because the principles of res judicata prohibit the SBE from imposing the escape assessment; and (3) because the SBE failed to bring the escape assessment as a compulsory counter claim and is therefore precluded from asserting it now. Only plaintiff's first argument could possibly justify an order of contempt; therefore, the Court shall limit its discussion to the issue of whether the escape assessment violates this Court's prior orders.

When a court issues an order, that decision must be respected and obeyed "'until [it] is reversed for error by orderly review, either by itself or by a higher court.'" Celotex Corp. v. Edwards, ___ U.S. ___, 115 S.Ct. 1493, 1501 (1995) (quoting Walker v. Birmingham, 388 U.S. 307, 314 (1967)). This Court clearly enjoined defendants from collecting or seeking to collect any taxes for tax years 1989 through 1992 on property owned by Santa Fe that was the subject property of the litigation. See September 7, 1994, Findings of Fact and Conclusions of Law at 13:20-22; September 14, 1994, Partial Judgment at 2:14-17; April 24, 1995, Modified Partial Judgment at 2:22-24. It is undisputed that the injunction was a clear and valid order of the Court and that the parties had actual notice of the order. Thus, the only issue is whether the SBE violated the order.

Defendants argue that they have not violated the Court's order on three grounds. First, defendants point out that the notice of the escape assessment that they sent to Santa Fe included a statement that "no county will collect or seek to collect any tax based on this escape assessment pending the outcome of the Board's appeal in USCA Ninth Circuit No 95-15999." See Notice of Escape Assessment, Pla'a Mem., Ex. C at 2.

Secondly, the SBE contends that it had to issue the notice of escape assessment in order to comply with its mandated responsibilities under the California Construction, art. XIII, sec. 19 and under Sections 721 and 861 of the Revenue and Taxation Code. Section 861 mandates:

> If any property subject to assessment by the board pursuant to Section 19 of Article XIII of the constitution escapes assessment, the board shall assess it in accordance with Section 864 at its value on the lien date of the year in which it escaped assessment.

Cal. Rev. & Tax Code § 861. The Code further requires that an escape assessment be made within four years of July 1 of the assessment year in which the property escaped assessment, absent the application of the penalty set forth in § 863. Cal. Rev. & Tax Code § 866. According to these provisions, the SBE was required to adopt any escape assessments for tax year 1991 on or before July 1, 1995, or else such assessments would be lost.

Finally, defendants argue that the "Subject Property" of the Court's 1994 judgment included Santa Fe's class 891 Commuter Property for only the tax year 1992, not for 1991. According to the Court's definition of the "Subject Property" in its Findings of Fact and Conclusions of Law, the only Commuter Property to which the judgment applied

was "properties which the SBE assigned both class codes 1 and, 891 to in tax year 1992, based on Santa Fe's negotiations with various southern California transit districts to sell track and/or trackage rights for commuter purpose[s]." However, the Court's injunction applied to taxes on such property for tax years 1989 through 1992. Since it is unclear whether the Court's Order applies to assessments on Santa Fe's class 891 Commuter Property for tax years 1989 through 1992 or just for tax year 1992, the Court shall not base its decision on this argument. Nonetheless, the Court finds insufficient grounds for contempt based on defendants' other arguments.

"Substantial compliance with a court order is a defense to an action for civil contempt." Balla, 869 F.2d at 466. As part of a showing of substantial compliance, the defending party must prove that it has taken "all reasonable steps" necessary to comply with the order. Balla, 869 F.2d at 466; In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987); Gifford v. Heckler, 741 F.2d 263, 265 (9th Cir. 1984) (citing Shuffler, 720 F.2d 396, 404 (9th Cir. 1976)). Given the SBE's responsibilities under the California Constitution and the California Revenue & Tax Code and their clear attempt to comply with the April 24, 1995, Partial Judgment, the Court finds that the SBE was in substantial compliance with the Court's orders. By explicitly stating that the notice of escape assessment was not collecting or seeking to collect any taxes in violation of the Court's orders, the SBE took reasonable steps to comply. Therefore, the Court finds insufficient grounds for contempt.

## III. CONCLUSION

For the foregoing reasons, the Court hereby DENIES plaintiff's motion for an order to show cause why defendants should not be held in contempt.

IT IS SO ORDERED.

Dated: February 26, 1996.

D. Lowell Jensen
United States District Judge